

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

TUESDAY, THE 27TH FEBRUARY 2007 / 8TH PHALGUNA 1928

F.A.O.No.278 of 2006

A.S.61/2004 OF THE COURT OF THE DISTRICT JUDGE, KOZHIKODE.

O.S.492/2002 OF THE COURT OF THE ADDITIONAL MUNSIF-I,
KOZHIKODE.
.....

APPELLANTS/RESPONDENTS/DEFENDANTS:-

1. N. HARIDASAN, S/O.PACHU KUTTY,
KOTTACKAL VEETIL, VENGELI AMSOM
VENGELI P.O., KOZHIKODE TALUK.
2. DAMODARAN NIAR, S/O.RAMAN NAIR,
KIZHEKKE NAMBIYERI, MAYANAD DESOM,
MAYANAD P.O., KOZHIKODE.

BY ADV. SRI.THOMAS ANTONY
SRI.TITUS MANI
SRI.S.SURAJ (PALATHANATHU)

RESPONDENT: APPELLANT/PLAINTIFF:-

RAGHAVAN NAIR, S/O.RAMAN NAIR,
VATTAKANDIPARAMBIL, KARUVATTOOR DESOM,
KOZHIKODE.

BY ADV. SRI.K.A.SALIL NARAYANAN.

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY
HEARD ON 27/02/2007, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:-

K.Padmanabhan Nair,J.

F.A.O.No.278 of 2006

Dated, this the 27th day of February, 2007

JUDGMENT

Heard. The following substantial questions of law arises in the First Appeal from Order:

(i) Whether the lower appellate Court acted legally in remanding the case after finding that the suit was not barred by limitation, but at the same time permitting the defendants to file petition to set aside the order declaring them *ex parte*.

(ii) Whether the trial Court can allow the defendants to raise a contention of limitation even if it finds that the defendants were prevented by sufficient cause from appearing before the Court on the date on which the case was posted for their appearance in view of the finding of the lower appellate Court regarding contention of limitation.

2. The defendants in O.S.No.492 of 2002 on the file of Additional Munsiff-I, Kozhikode are the appellants in this First Appeal from Order. They are challenging an order passed by the

lower appellate Court in A.S.No.61 of 2004 by which the lower appellate Court set aside a decree passed by the Munsiff dismissing the suit and remanding the same after finding that the suit is not barred by limitation.

3. The suit was for money. Appellants remained *ex parte*. Though the appellants were *ex parte*, the learned Munsiff held that the Article applicable to the facts of the case is Article 31 of the Limitation Act and dismissed the same. It was held that the suit was barred by limitation. The plaintiff filed A.S.61 of 2004 before the District Court. The learned District Judge reversed the finding regarding limitation and found that the suit is not barred by limitation and remanded the suit for deciding the other issues. Challenging that order, the F.A.O. is filed.

4. In the plaint, it was alleged that on 2.12.1995 the appellants borrowed an amount of Rs.95,000/- and executed a document undertaking to repay the same. When the respondent-plaintiff demanded repayment of the amount, the first appellant repaid an amount of Rs.50,000/- on 1.4.1997 and issued a cheque dated 10.4.1997 for the balance amount. The cheque was dishonoured when it was presented for collection and hence the

plaintiff is entitled to get an amount of Rs.72,250/-.

5. The lower appellate Court held that there is no limitation, but at the same time held that in case the defendants file petition to set aside the order declaring them *ex parte*, the same shall be disposed of by the Munsiff in accordance with law and in the light of the observations made by the appellate Court. In view of the finding of the lower appellate Court that suit is not barred even if the prayer of the appellants to set aside the *ex parte* order is allowed, they will not be in a position to raise a contention of limitation. So, the lower appellate Court ought to have set aside all findings and remanded the matter.

6. As already stated, the appellants did not appear and file any written statement. So, I am of the view that when the lower appellate Court thought it fit to give one more opportunity to the plaintiff to prove his case, it ought to have remanded the matter without entering into any finding on any of the issues arising for consideration. Considering the facts and circumstances of the case, I am of the view that it is only just and proper that an opportunity is given to the appellants-defendants to file written statement and contest the matter on its

merits.

In the result, the First Appeal from Order is allowed in part. The finding of the lower appellate Court that the suit is not barred by limitation is set aside. The order declaring the appellants as *ex parte* is also set aside and they are given three weeks time from the date of receipt of a copy of this judgment in the trial Court to file written statement. The learned Munsiff shall dispose of the suit after giving both sides an opportunity to adduce evidence in accordance with law. The parties shall appear before the Court below on 20th March, 2007. I.A.No.4470 of 2006 shall stand dismissed.

K.Padmanabhan Nair
Judge

vku/-